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HEADLINE: LEGAL ARGUMENT ALONE WON'T SUFFICE

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BODY:

ANY REASONABLE assessment of yesterday's oral arguments in the Florida Supreme Court by the lawyers aligned with the two presidential campaigns must begin with the two audiences at which they were aimed.

Legally, of course, the target was the justices. But the judicial audience was not the only one, and probably not the most important one. Ultimately, the decision will be made in the public arena, not the courtroom.

The legal arguments on both sides regarding the correct construction of Florida's statutes were fairly evenly matched. But court cases are not won by legal argument alone.

In the words of Justice Oliver Wendell Holmes Jr., "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."

Judges do not appreciate being told that they must be the mindless implementers of arbitrary edicts, but quite properly wish to feel that they are earning their pay by reaching results that are consistent with justice and good sense.

From that viewpoint, George W. Bush's side, which took a strongly legalistic approach, turned in the weaker performance. Attorney Michael Carvin, for example, argued that the issues were all controlled by statutory rules, and told the justices (in what passes for strong language in an appellate courtroom) that it would be "an abuse of discretion" for them to do "anything that departs from those rules."

The only lawyer on the Bush side who displayed the appropriate reasonableness was Joseph Klock, who sketch- ed out a theory by which all Florida ballots might be rechecked on a timely basis.

Intriguingly, in the last moments of the argument, David Boies essentially accepted this proposal for Al Gore's side -which may point the way to an ultimate compromise, whether in or out of court.

As always in legal matters, the outlook is uncertain, and it is particularly hazardous to base predictions on oral arguments. But, if the Florida Supreme Court sticks to its general pattern of making even highly controversial decisions in accordance with rules of law that attempt to be practically, intellectually and morally satisfying-as well as formally correct-Gore is likely to emerge as the victor from this tangled and ongoing litigation saga.

At that point, unless Bush is very confident that he can retain his vote margin in Florida, law and politics may well come to their most visible meeting in the judicial system.

Although the possibility got only tangential mention during the argument, the Bush team in its briefs has laid the groundwork for seeking review in the United States Supreme Court, which from its very earliest days has regularly dealt with legal issues arising from intense political disputes.

In any ordinary case, that court, looking solely to the legal issues, would be most unlikely to grant review. But, because this is hardly an ordinary case, the court might feel it should intervene in order to reach an outcome that gains the maximum public acceptance.

History suggests that this would not be a particularly wise reason for action. To take one spectacular example, the court's effort to put a definitive end to slavery as a political issue in the 1856 Dred Scott case had precisely the opposite effect.

Of course, whatever the courts decide in the coming weeks, no one is suggesting that a civil war will break out. But neither will those rulings represent the last word. Depending on their persuasiveness, they will be contributions of more or less weight to a broader dialogue. The eventual decision about the outcome of that most political of events—a presidential election—will be a political one.

Any stable resolution will have to be one that obtains a reasonable consensus of the American people.

This is as it should be. The courts in our system remain under real, if attenuated, democratic control. And, because the public is fair-minded, the openness of the Gore representatives in court to pragmatic mechanisms for determining the true will of the Florida voters suggests the Democrats should be recorded as having prevailed on this occasion.

For, regardless of which candidate ultimately gains the White House, the country will have achieved a victory only if the outcome is one that leaves the public believing that the incumbent has gained office through a process that—however long and messy—has given him democratic legitimacy.

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